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IN

The Supreme Court of the United States

OCTOBER TERM, 1900.

JOHN P. MALLETT AND CHARLES B. MEHEGAN,
PLAINTIFFS IN ERROR,

against

THE STATE OF NORTH CAROLINA,
DEFENDANT IN ERROR.

Brief of F. H. BUSBEE, for the Plaintiffs in Error.

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Permission of the Court having been given to file a brief in reply to the brief filed for the defendant in error, without repeating the argument in the printed brief or the oral argument, the appellants will confine themselves to a citation of the pages of the record and of the cases relied upon to sustain their contention.

The sections of the Constitution of the United States which the appellants contend are involved are Article I, section 10: "No State shall enter into any treaty, etc., pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility."

Amendments, Article IV.

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures

shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized."

Article V.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

Article XIV.

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The provisions of the Constitution of North Carolina involved in this appeal will be found in the several sections copied below.

Article I, in Criminal Prosecutions.

"SEC. 11. In all criminal prosecutions, every man has the right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony, and to have counsel for his defence, and not be compelled to give evidence against himself, or to pay costs, jail fees, or necessary witness fees of the defence, unless found guilty."

Article I, Ex Post Facto Laws.

"SEC. 32. Retrospective laws, punishing acts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty, wherefore no *ex post facto* law ought to be made. No law taxing retrospectively sales, purchases, or other acts previously done ought to be passed."

The statute establishing the Eastern District Criminal Court is found in the Public Acts of 1899, chapter 471. The 6th section of this act reads as follows:

"SEC. 6. That in case an appeal is taken from the judgment of the said Criminal Court for any of the counties aforesaid to the Judge of the Superior Court riding the district, of any question of law or legal inference, and the said Judge shall reverse or modify the decision of the Criminal Court from which the cause was appealed, that the State or the prisoner or prisoners, as the case may be, shall be entitled and allowed to appeal directly to the Supreme Court from the decision of any such Judge as aforesaid, and the appeal to the Supreme Court shall be made up in such manner as appeals are made up as now provided for offences originally tried in the Superior Courts of the State and appealed to the Supreme Court; that in case of appeal from the Criminal Court to the Judge of the Superior Court riding the district, on any question of law or legal inference, and said Judge shall reverse the decision of the Criminal Court, from which such appeal was taken, and no exception was taken to the judgment of the said Judge of the Superior Court, and no appeal is taken to the Supreme Court, the same shall be certified to the Clerk of the Criminal Court, and in case a new trial is granted shall be docketed in the Criminal Court from which appeal was taken, and shall be heard and tried at the next term of the Criminal Court."

By comparison of this act with the act to establish the Western District Criminal Court, Acts of 1899, chapter 371,

it will be seen that the statutes are almost identical, except that section 6 is omitted in the latter act.

The original assignments of error will be found on pages 171, 172 and 173 of the record. As the record is settled by the Court, or by agreement of parties, of course these assignments of error will be taken as made at the proper time on the appeal and before the motion for reargument was submitted. The judgment of the Superior Court on pages 59 and 60, and the case on appeal for the Supreme Court, on pages 60 and 61, are records of even greater force than the assignments of error, since they are records of the Court, rather than a claim of counsel.

These show that the new trial was granted in the Superior Court, for that the facts developed on the examination of the defendants under proceedings supplementary to execution, were, over their objections, used to effect their conviction, both directly in evidence of Dr. Baker and Mr. Henry Gilliam, and indirectly by placing before the jury the evidence of these defendants brought out by the cross-examination before S. S. Nash, referee, in which examination the defendants were asked concerning some matters developed in the said supplementary proceedings.

Extract from Judgment, page 59.

And the assignments of error made by the State in its appeal from the judgment of Judge Hoke, on pages 60 and 61, the finding and conclusion of the Court, that the examination of the defendants was used to secure their conviction, etc.

It is respectfully submitted that where the objection is distinctly made that the defendant is "compelled in any criminal case to be a witness against himself," it follows inevitably that it involves a federal question. By a critical examination of the exceptions which appear by the record to have been taken to the evidence of the various witnesses, involving the defence, that the defendants were being compelled to give evidence

against themselves, will be found at the bottom of page 41, and at the top of page 42 of the record; on page 45, showing that the existence and contents of the book were developed under the proceedings supplemental to execution; on pages 46 and 47, 48 and 50; in the charge of the Court on page 58 it appears that the evidence submitted to the jury by the Judge, upon which the prosecution asked conviction, involved many points which depended solely on the books seized by the sheriff and upon the evidence originally drawn out under the supplementary proceedings, and afterwards extracted from the witnesses when they were examined for the purpose of showing the actual value of the goods set apart to Mallett and Mehegan under the usual proceedings to set apart the personal property exemption. These items are found on pages 57 and 58, Nos. 2, 4, 5, 6, 7 and 10, and depend largely upon the evidence obtained under the special proceeding. The petition of the defendants will appear upon page 65. Under the decisions of North Carolina there can be no rehearing in a criminal case.

State v. Jones, 69 N. C., 16.
State v. Starnes, 94 N. C., 973.

The petition, therefore, was filed before the action of the Supreme Court was final, because, although the opinion had been filed, it had not been certified down to the lower Court. The Court consider the matters alleged in the opinion and reaffirm the original opinion. Page 69. No objection is made by the Judge writing the opinion that the questions upon which the opinion of the Court is asked to be reviewed did not appear in the record. The record contains the examination of the plaintiffs in error under the proceedings supplemental to execution, under The Code of North Carolina, sections 488 to 500 inclusive. The execution in the case of *Baker and Adams, Administrators, v. Mallett and Mehegan,* having been returned unsatisfied, the defendants, Mallett and Mehegan, were forced

to submit to a compulsory examination under section 488, subdivision 1. The proceedings seem to be regular in form, and all objections were overruled.

Subdivision 5, of section 488, of The Code, is as follows: "(5) No person shall, on examination pursuant to this chapter, be excused from answering any question on the ground that his examination will tend to convict him of the commission of a fraud; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution; nor shall he be excused from answering any question, on the ground that he has, before the examination, executed any conveyance, assignment, or transfer of his property for any purpose, but his answer shall not be used as evidence against him in any criminal proceeding or prosecution."

It has been decided that under this section a witness can not excuse himself from answering by alleging that his answer may be used against him in criminal proceedings.

La Fontaine v. Underwriters, 83 N. C., 132, an extract from which case is quoted in the original brief.

Under the provisions of The Code, sections 501 to 524 inclusive, from the stock of goods levied upon under execution the personal property exemption was set apart to the defendants in the execution (the plaintiffs in error), by appraisers.

Under section 519, of the judgment debtor shall be dissatisfied with the valuation and allotment of the appraisers, he may, upon notice to the adverse party and the sheriff, file exceptions. These exceptions would stand for jury trial, but of course by consent can be referred. The matter was refered to S. S. Nash, and upon the reference, after the plaintiffs in error had testified as to the value of the personal property allotted to them they were examined fully as to the same matters they had been examined upon in the supplementary proceedings. The full record will show the examination of the plaintiffs in error as to the items of personal property exemption.

Under cross-examination the plaintiffs in error were examined fully concerning the matters which had been drawn out of them (while they were under the protection of the law from any subsequent use in criminal proceedings) in the proceedings supplementary to execution, as appears from the cross-examination of J. P. Mallett, on pages 162, 163, and following pages. It appears from that cross-examination that the examination begun before the Clerk of the Superior Court under the supplementary proceedings was used on the cross-examination, and the plaintiffs in error were made to repeat the evidence which had been at first drawn out before the Clerk. Under these facts the plaintiffs in error contend that, so far as the objections based upon the Constitution of the United States, Article I, section 10, are concerned, it appears affirmatively that they could not have been made except in the Supreme Court. Until the State prosecuted its appeal in that Court, under section 6 of the Act of 1899, above cited, no question was presented for adjudication. It was an attempt of the State to prosecute an appeal from the ruling of Judge Hoke in the Superior Court which first raised the question, and the decision of the Supreme Court, sustaining the right of the State to appeal, presents the question fairly before the Supreme Court of the United States. I think it will hardly be contended that this is not squarely presented by the record and upon the distinct ground that the act was unconstitutional, in so far as it applied to trials which took place in the trial Court before the passage of the Act of 1899, because it was *ex post facto*. It also involves with almost equal certainty the contention set up under the 14th amendment, that it deprives the defendants of the equal protection of the law. The plaintiffs in error respectfully insist that this case does not come under that class of cases in which appeal to the federal tribunal is an afterthought, and where the objections set forth in the proceeding in the Court below do not affirmatively appear to have affected the result. It can never appear affirmatively that the

reduction of the number of challenges, or legislation permitting a struck jury, or any of the objections made on pages 3, 4 and 5 of the brief of the defendant in error, actually affected the result; all that could be contended in any of these cases is that it *might* possibly have affected the result. But in the case before the Court it affirmatively appears that by permitting the State to appeal, under the terms of a statute passed after the trial, the result has been reversed and the plaintiffs in error, who were entitled to a new trial under the decision of the Superior Court Judge, have been denied the same upon an appeal. Under this head is also presented the objection to the action, under the 14th amendment, that the plaintiffs in error have been denied the equal protection of the law. Upon the other general branch of exceptions it appears from the record, as quoted above, that the plaintiffs in error expressly objected to the production of their private books, seized under execution, the existence and contents of which had been made to appear by the evidence taken in the supplementary proceedings, after the plaintiffs in error had been examined under the protection afforded by the section concerning supplementary proceedings above quoted.

It is true that the Constitution of the United States was not mentioned by name in the Superior Court, upon the questions involved in the admission of testimony, so far as it appears from the record, though doubtless it was upon the argument. It surely can not be necessary, when the plaintiff sets up the privileges and immunities guaranteed by the Constitution of the United States, that he should file a formal plea that this claim is made under the Federal Constitution.

It is respectfully submitted that no appeal which has reached this Court involved the same question as the present case. While the subject was discussed at length in the Slaughter House cases, there has never been any decision as to what are the "privileges or immunities of citizens of the United States"

There have been a great many decisions as to what are *not* included. The terms do not include the right to be tried by a jury of twelve, nor to be exempt from prosecution unless the indictment is found by a grand jury, etc. As is quoted from Judge Washington, with approval in *Maxwell v. Dow*, 176 U. S., 581: "We feel no hesitation in confining this expression to those privileges and immunities which are in their nature *fundamental*, which belong of right to citizens of free governments, and which have at all times been enjoyed by the citizens of the several States which compose this Union from the time of their becoming free, independent and sovereign." And in *Cole v. Cunningham*, 133 U. S., 107, it is said that the right to institute actions is among the privileges and immunities which all citizens are entitled to. It seems to the plaintiffs in error that there is no fundamental right pertaining to citizens who inherit as their dearest birthright the privileges and immunites guaranteed by the common law, more sacred than the right not to be liable to give evidence against one's self in a criminal prosecution. While the Court has, upon the one hand, never been swift to search out and proclaim error in the administration of its criminal law by a State, so upon the other hand it has never yet failed to protect the privileges, immunities and liberties of the citizens of the United States, when assailed or endangered.

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